In the Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

THE SINGER MANUFACTURING COMPANY,

Petitioner,

vs.

HERMAN CRAMER,

Respondent.

STATEMENT OF FACTS.

On October 8, 1896, Herman Cramer began this action at law against the Singer Manufacturing Company in the United States Circuit Court for the Northern District of California, alleging infringement of letters patent No. 271,426, granted January 30, 1883, for an improvement in sewing machine treadles, and asking a judgment for damages.

An answer was filed by the Singer Company on March 18, 1897, setting up numerous defenses, among which was one of alleged prior adjudication based upon a judgment rendered for the defendant in a former case brought by Herman Cramer against one Willis B. Fry.

The case came to trial on August 10th, 1898, and at the conclusion of the testimony the judge presiding (Honorable James H. Beatty of the Idaho District) instructed the jury to find a verdict for the defendant solely on the ground that the judgment in the case of *Cramer* vs. *Fry* operated as a prior adjudication against Cramer.

A bill of exceptions was thereupon tendered by Cramer and signed and sealed by the court, whereby the case was removed to the United States Circuit Court of Appeals for the Ninth Circuit.

Upon a hearing in the Court of Appeals it was there held that the judgment in the case of *Cramer* vs. *Fry* did not operate as a prior adjudication, and accordingly the judgment was reversed and the case remanded for a new trial. (*Singer Manufacturing Co.* vs. *Cramer*, 93 Fed. Rep., 636.)

A petition for rehearing was filed, but the same was denied, and thereupon the Singer Company filed an application in this court at the October term of 1899, pray-

ing for the issuance of a writ of *certiorari*. That application was denied by the court on October 30, 1899. (*Singer Manufacturing Co.* vs. *Cramer*, 175 U. S., 725.)

The case then went back to the Circuit Court for a new trial, and after a lengthy trial on the merits a verdict was rendered for the plaintiff on the 20th of April, 1900, for $12,456, for which sum and costs judgment was duly entered.

From this judgment a writ of error was taken by the Singer Company in the Circuit Court of Appeals for the Ninth Circuit. After a full argument in that Court the judgment was affirmed on May 13, 1901. (*Singer Manufacturing Co.* vs. *Cramer*, 109 Fed. Rep., 652.)

A petition for rehearing was made and denied, and thereupon the Singer Company applied to this court a second time for the issuance of a writ of *certiorari*.

We submit that this second application for a writ is as much without merit as was the first one, and is intended merely as an effort to protract this seemingly endless litigation.

ARGUMENT.

I.

The first point urged by counsel for petitioner is stated as follows:

> *"The petition should be granted because there has been such diverse construction of respondent's patent by various federal judges in separate trials as would demand that a final settlement of its rightful construction and application should be made by this court.*

In support of this contention it is pointed out by counsel for petitioner that in the case of *Cramer* vs. *Fry*, 68 Fed. Rep., 201 the judge then presiding (Hon. Joseph McKenna) construed the patent and instructed the jury to find a verdict for the defendant on the ground of non-infringement. It is further pointed out that in the present case, upon the first trial, Judge Beatty followed the ruling of Judge McKenna, which ruling was reversed by the Court of Appeals, and upon the second trial of the case Judge Morrow likewise construed the patent, and while holding it to be a narrow invention, submitted the question of infringement to the jury, which ruling was affirmed by the Court of Appeals.

We fail to discover in these facts any such diversity of opinion as would justify the issuance of a writ of *cer-*

tiorari. Our understanding of the law applicable to such cases is that where there is a diversity of opinion between two different *courts of appeals,* this court will issue a writ of *certiorari* in the interest of uniformity of decision; but it strikes us as a novel proposition to claim that the writ should issue where the alleged conflicting decisions are in the same circuit, and one of them is by the *nisi prius* court and the other by the appellate court. Every judgment that is reversed presents a case of difference of opinion between judges, but the learned counsel should know that the decisions of the appellate court are final and conclusive. Consequently, it matters not in the case at bar what were the views, opinions, or judgments of the lower court, because the judgment of the Court of Appeals is by the statute made final and conclusive. It establishes the law of the case, and unless some other circuit court of appeals should hold differently, there would not be that conflict of decision which justifies the issuance of a writ of *certiorari.* This matter appears to us so elementary that we must be pardoned for not arguing it. The bare statement of the facts is, in our judgment, all that is necessary to be presented to this court.

II.

The second point urged by counsel for petitioner is stated in the following language:

> *"That vast sums of money claimed by the respondent Cramer, of the petitioner, by reason of the patent and this single jury verdict, the methods used by respondent Cramer to enforce such demands, and the ignoring of the rules of decisions of this court alone securing such results, represent such matters of gravity and importance as entitle the granting of this petition."*

This is evidently an attempt to bring the case within the rule laid down by this court to the effect that the writ of *certiorari* will be granted sometimes in matters of gravity and general importance.

In the case of *Lau Ow Bew, Petitioner,* 141 U. S., 583, the construction of Acts of Congress in the light of treaties with a foreign government and the status of domicile in respect of natives of one country domiciled in another, a matter of international concern, were considered to be matters of such gravity and importance to the whole country as to justify the issuance of a writ. That case seems to clearly define what was meant by matters of gravity and importance. No such case has been presented by this petitioner. Here we have merely

a private controversy between two litigants in no way affecting the public at large.

Analyzing this "Point II" of the petitioner, it would seem to embrace three grounds in one, viz:

1. *That the respondent Cramer claims vast sums of money.*

2. *Improper methods used by respondent Cramer to enforce such demands.*

3. *Ignoring of the rules of decision of this court.*

These three grounds are stated to be "such matters of gravity and importance as entitle the granting of this petition."

Regarding the first, it is verging dangerously on the puerile. Surely no argument could be required of us in answer thereto.

As to the second ground, it is charged that Cramer is guilty of improper methods, because he has filed separate suits in separate districts. But in this course he is merely doing what the law allows him to do, viz: To sue in the district where the infringement actually occurs and the defendant has a managing agent. It was open to Cramer, who lives in California, to go to New Jersey, where the Singer Company is incorporated, and bring a single suit to recover all the damages due him, or to bring several suits in the several districts where the

infringements occurred, and to recover in each suit the damages due him in that district.

If there is anything reprehensible in this course, we fail to see it. Cramer is merely pursuing the remedies allowed him by the statute, and is proceeding in the method allowed by the statute. To have required him to travel across the continent and institute an omnibus case in New Jersey, where the defendant is domiciled, would have entailed upon him such hardship and expense that it would amount practically to a denial of justice. Cramer is an old man, residing in the mountains of California, afflicted both with extreme poverty and bad health. Under these circumstances the most natural thing for him to do was to bring suit at his own home, where it could be prosecuted speedily and at small expense, and this is the whole explanation of the fact that he began his first suit in California.

The third ground urged under counsel's "Point II," viz: "*the ignoring of the rules of decision of this court*," is not elaborated in his brief at all, nor does the learned counsel vouchsafe to state wherein any rule of this court has been ignored, nor by whom. Evidently this matter was put in merely for the purpose of rounding off a nice rhetorical period. Such glittering generalities have no proper place in a dignified argument before the highest tribunal of the land.

III.

The remaining points made by counsel for petitoner may be grouped together, inasmuch as the answer to one is an answer to all of them. They are stated in the brief as follows:

"Point III. The petition should be granted because the only rightful construction that can be put upon the respondent Cramer's patent, read in connection with, and in the light of the file wrapper and contents thereof, is the construction given by his Honor, Judge McKenna, in the case of the respondent Cramer vs. your petitioner's agent, Fry, 68 F. R., 201.

"Point IV. A rightful construction of the Cramer patent upon the face of the patent itself, without reference to the file wrapper and contents, and the comparison thereof with petitioner's device, demonstrates clearly the fact of non-infringement of the first claim thereof by defendant's structure.

"Point V. The judgment is wholly unjustifiable, because the respondent Cramer suffered no damage of any kind, character, or description whatever by reason of the alleged infringing acts of the petitioner, but, on the contrary, if his patent was of any value or utility, the petitioner furnished a wide market for him therefor.

"Point VI. The petitioner, the Singer Manufacturing Company, could not have damaged the respondent Cramer's "business" in the installation of his patented braces in the existing machines in the State of California, because the petitioner did not send any

sewing machines into the State of California containing the alleged infringing device of Cramer's patent until nearly two years after the abandonment by Cramer of any attempt to place his patented brace in any sewing machine.

"Point VII. This petition for writ of *certiorari* should be granted because the defense by your petitioner of its agent Fry, in the Cramer-Fry suit, tried before and decided by his Honor Judge McKenna by an instruction to the jury to find for the defendant upon the ground of non-infringement, was an open defense made by your petitioner wherein your petitioner paid all costs of such litigation and counsel fees, and such facts were known by respondent Cramer's counsel in that case, as appears by positive proof shown and offered in this case.

"Point VIII. The petition should be granted because the whole record in this case shows that there is absent from the entire testimony, given by the respondent Cramer, any reliable proof that he has suffered any damage by reason of any act of the petitioner; and that upon the face of all of the proof given by him, petitioner's requested instruction to the jury to return a verdict for nominal damages should have been given, if technical infringement should be found to exist.

"Point IX. The petition should be granted because the hanging of a sewing machine treadle in a vertical cross-brace in itself is without practical value, advantage or utility, and manifestly is without patentable novelty."

There is no merit in any of these points. They are all questions of fact upon which the evidence was conflict-

ing. Therefore, the finding of the jury thereon is conclusive.

Is it possible that the learned counsel is not aware of the elementary rule of law that all questions of fact are to be deemed conclusively settled by the verdict of a jury, and that an appellate Federal court cannot review them? Even if this court should grant a writ of *certiorari*, it could not consider any questions except those that were open for consideration by the rules of appellate practice. It could only consider questions of law, and could not interfere with questions of fact that were decided by the jury. In other words, its review of the case would be circumscribed by the same rules as was the review of the case by the Court of Appeals. Following those rules, this court could not consider any of the questions presented in the points of the counsel above quoted, because the verdict of the jury upon those questions must be taken as conclusive. Therefore, we shall not burden this court with any argument regarding them.

The conclusion of the learned counsel's brief is both picturesque and amusing, where he descants upon what he terms "the unqualified hardship, wrong, and injustice that has been done your petitioner.

While it is true that assertions of this kind have no proper place in an argument and can have no influence upon the court, yet we cannot forbear retorting that if

there has been any "hardship, wrong, and injustice" done by either of the parties, it was by the Singer Manufacturing Company and not by Cramer. By reference to the record it will be seen that as early as the year 1883, when this patent was granted, Cramer wrote to the Singer Manufacturing Company, calling their attention to his patent and asking them to adopt it and pay him a small royalty therefor. They answered by saying in substance that the device was of no value and they did not care to use it. Consequently, his request for a royalty was denied. And yet within six months thereafter we find this same Singer Company, through its head mechanic, applying for a patent for an alleged improvement upon this Cramer device in plain infringement thereof, and this device the company immediately put upon the market, and ever since then the same has been used in all its standard machines, many millions of which have been sold. Cramer immediately called their attention to the fact that they were infringing, but they ignored his demands and treated him with contempt. Thereupon he was compelled to commence suit against them, and he has been engaged in this litigation for these many years, until his patent has expired. It would be a nice calculation to determine the "vast sums," if counsel will pardon us for using his own language, which the Singer Company has made by its piratical use of the Cramer

invention. That they were "vast sums" there can be no manner of doubt, but that the company intends to make no reparation, if it can possibly avoid it, is equally without doubt. Under such circumstances, it does not require the wisdom of a Solomon nor the judicial acumen of an Eldon or a Mansfield to properly locate, as between these litigants, "the unqualified hardship, wrong, and injustice."

It is apparent to us that the application for this writ is merely in line with the policy of the Singer Company to wear out its antagonist, Cramer, by protracted litigation. The points presented to this court have been argued so often by the learned counsel and so often decided against him by the courts, that he ought to know by this time that there is no merit in them. They were argued at length on the first trial, then again on the hearing in the Court of Appeals, then on petition for rehearing in the Court of Appeals, and then in this court on the first application for a writ of *certiorari;* then again they were argued on the second trial in the Circuit Court, then on the second hearing in the Court of Appeals, then on petition for rehearing in the Court of Appeals, and finally on this second application for a writ of *certiorari.* The number of briefs that have been written by the counsel would fill a library, and the amount of money his clients have spent in the

litigation is a small fortune. No disposition has ever been shown to make the slightest reparation to Cramer for the wrong and injustice done him in appropriating his invention, but the studied effort of the company has at all times been to pay him nothing and to wear him out by protracted litigation. The mere fact that this is a second application to this court for a writ of *certiorari* in the same case shows the persistency of the counsel and the limit to which he is willing to go. It is not often in a patent case that a counsel makes *one* application to this court for a writ of *certiorari*, for the circumstances must be unusual which would justify the issuance of such a writ; but a second application for this writ after the first has been refused, in a case which presents nothing more than a controversy between two private individuals, tends strongly to show the animus which prompts that course. Cramer's patent expired two years ago, and during the whole life of his patent he has been engaged in this seemingly endless litigation; and now, when he appears to be nearing the end, he is further delayed by the present application for a writ of *certiorari*. Is not this a case for an application of the benign maxim: *Interest reipublicae ut finis sit litium?*

Respectfully submitted,

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Counsel for Herman Cramer.